# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

#### **REGION 34**

#### In the Matter of:

Connecticut Humane Society:

Respondent

and : Case No.: 34-CA-12557

:

**International Association** 

Of Machinist & Aerospace

Workers, AFL-CIO,

District Lodge 26

:

Charging Party :

Connecticut Humane Society:

Respondent :

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and : Case No.: 34-RC-2351

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International Association

Of Machinist & Aerospace

Workers, AFL-CIO,

District Lodge 26

: Date: August 5, 2011

Petitioner

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# CONNECTICUT HUMANE SOCIETY'S EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE AND BRIEF IN SUPPORT THEREOF

The Connecticut Humane Society (hereinafter Respondent or "CHS"), hereby files its exceptions to the Decision of the Administrative Law Judge (hereinafter

"DALJ") in the above-captioned matters and hereby submits its Brief in Support of those exceptions. Respondent timely filed a request for extension of time to file exceptions, which was granted, to August 5, 2011.

## Table of Contents

I.	Introduction and Short Statement of the Issues	Page 1
II.	Legal Basis for Determining Supervisory and Managerial Status	Page 2
III.	Exceptions to ALJ's Findings and Conclusions	Page 5
#1	The Respondent takes exception to the ALJ's conclusion that Ma not a supervisor. (DALJ at p. 42, lines 34-36).	ureen Lord was Page 5
#2	The ALJ's conclusion that there was no evidence Maureen Lord made any recommendation concerning hiring decisions is contrary to the record, and Respondent takes exception to the ALJ's resulting failure to find Maureen Lord satisfied the statutory standard for supervisory status. (DALJ at p. 31, line 48 through p. 32 line 33, and DALJ p. 37, line 11, et seq.). Page 10	
#3	The ALJ failed to give appropriate weight to clear evidence that Marie Kuznir considered Maureen Lord to be her supervisor. (I lines 45-46).	• •
#4	The fact that Mr. Johnston, then CHS President, was a decision-maker in hiring matters, is given too much weight by the ALJ, while testimony establishing Maureen Lord's authority to recommend hiring is given too little weight. (DALJ at p. 37, lines 38-39; p. 38, lines 35-39; and p. 39 lines 31-36). Page 12	
#5	The evidence established that Maureen Lord participated in the selection of a District Manager, but the ALJ failed to credit this evidence as supporting the existence of Ms. Lord's authority to recommend hiring decisions. The ALJ failed to credit this same evidence as demonstrating Ms. Lord's managerial status. DALJ at p. 39, lines 4-50).  Page 12	
#6	The ALJ improperly circumscribed the type of evidence necessar authority to discipline by (a) concluding that the failure to use the "discipline" in a corrective memorandum from Ms. Lord to Ms. demonstrates that Ms. Lord was not a statutory supervisor (DAL)	word Kuznir

- 16-45), and (b) failing to find that Ms. Lord's demonstrated authority to discipline Customer Service employees also applied to her remaining subordinate, Gay Maria Kuznir, from June of 2009 until Ms. Lord's termination in December of 2009. (Id)

  Page 13
- #7 The ALJ incorrectly relies on the conclusion that employee performance reviews were not used by Respondent in calculating or deciding wage increases or future discipline as part of the analysis of Maureen Lord's supervisory status. (DALJ at p. 30, lines 19-48 through p. 31 line 46). Page 14
- #8 The ALJ's suggestion that Respondent has "fallen considerably short" of successfully demonstrating Ms. Lord's supervisory authority (DALJ at p. 42, line 35) is inaccurate and contrary to the evidence. Page 14
- #9 The ALJ incorrectly concluded that Respondent failed to meet its burden of proof that (a) Maureen Lord and (b) Bridget Karchere were managerial employees.

  (DALJ at p. 43, lines 29-31). Page 15
- #10 The ALJ misconstrues the nature of the evidence of Ms. Lord's managerial employee status, and as a result misapplies precedent on this issue. (DALJ at p. 44, lines 45-48). Page 27
- #11 The ALJ misconstrues the critical nature of Ms. Lord's work, and therefore misconstrues the authority she was vested with, when he attempts to downplay her "advertising" responsibility, and as a result her managerial role in fundraising work. (DALJ at p. 45, lines 19-30).

  Page 28
- #12 Respondent excepts to the drawing of an adverse inference based on Respondent's "failure to call Freeman, an admitted supervisor."

  (DALJ at p. 28, lines 19-22). Page 28
- #13 Because the ALJ incorrectly concluded that Maureen Lord was not a supervisor and that Maureen Lord and Bridget Karchere were not managerial employees, he incorrectly found that Respondent violated the Act by terminating their employment. (DALJ at p. 48, lines 22 and 23)

  Page 28
- #14 The ALJ incorrectly concluded that Maureen Lord and Bridget Karchere should be granted the remedy of reinstatement, based on his erroneous conclusions regarding their supervisory and/or managerial employee status. (DALJ at p. 55, line 49, through p. 56, lines 1 and 2).

  Page 29
- #15 The ALJ incorrectly concludes that Respondent failed to show that either Ms. Lord or Ms. Karchere engaged in "other conduct justifying Respondent's failure to reinstatement them." (DALJ at p. 57, lines 19-21). Page 29

- #16 The ALJ incorrectly concluded that the Respondent failed to adduce evidence that Ms. Lord and Ms. Karchere would not be able to function as members of a team if reinstated. (DALJ at p. 55, lines 26-47). Page 31
- #17 The ALJ incorrectly asserts that the comments made by Maureen Lord and Bridget Karchere "were all made in the context of protesting" their allegedly unlawful terminations from employment. (DALJ at p. 57, lines 26-28).

  Page 36
- #18 The ALJ failed, when addressing the issue of an order of reinstatement, to consider the magnitude of the statements made by Ms. Lord and Ms. Karchere in the context of returning them to work as part of Respondent's highest level of management, and the ALJ relied too heavily on cases involving reinstatement of lower level employees. (DALJ at p. 56, line 24 through p. 57 line 24). Page 36
- #19 The ALJ has, in effect, required the Respondent to "prove a negative," by requiring evidence from the Respondent that Ms. Lord and Ms. Karchere did not subjectively believe their claims made in blog statements submitted in the record. (DALJ at p. 57, line 40 through p. 58 line 15).

  Page 36
- #20 The ALJ mischaracterizes the Respondent's decision to expend its resources defending itself against a union organizing drive assisted by internal union "plants" by concluding that such action can constitute misuse of funds and corruption. (DALJ at p. 58, lines 35-40).

  Page 37
- #21 The ALJ incorrectly concluded that Maureen Lord's conduct did not coerce or interfere with employee free choice, (DALJ at p. 68, lines 39 through 44), that neither the conduct of Bridget Karchere nor the conduct of Maureen Lord was objectionable, (DALJ at p. 72, lines 23 and 24), and that the actions of Karchere and/or Lord were insufficient to warrant setting aside the election. (DALJ at p. 72, lines 28-30).

  Page 37
- #22 The ALJ's Conclusions of Law numbered 3, 4 and 5 are based on his findings that Ms. Karchere and Ms. Lord were neither supervisors nor managers, and are therefore incorrect. (DALJ at p. 75, lines 21 through 45). Page 47
- #23 The ALJ's Conclusion of Law number 7 is based on his finding that the activities of Ms. Lord and Ms. Karchere disrupt the "laboratory conditions required for a free and fair election, and are therefore incorrect.
  (DALJ at p. 75, lines 44-45).
- IV. Conclusion Page 47

### I. <u>Introduction and Short Statement of the Issues</u>

Hon. Steven Fish, ALJ, conducted hearings on November 17, 18 and 19, 2010 in these combined matters and issued his decision on June 8, 2011. The primary issues Judge Fish addressed were the following:

Whether Ms. Maureen Lord was a statutory supervisor, and as such excluded from the protections of the National Labor Relations Act ("NLRA" or the "Act"), and therefore CHS lawfully terminated her employment because she was not protected by the Act;

Whether Ms. Karchere and/or Ms. Lord were managerial employees, and as such are excluded from the protections of the NLRA, and therefore CHS lawfully terminated their employment because they were not protected by the Act;

Whether, assuming that Ms. Karchere and/or Ms. Lord were not supervisors or managers, and therefore their discharges violated the NLRA, they should nonetheless be denied the remedy of reinstatement in light of their actions, which demonstrate that reinstatement is unreasonable and inappropriate under the circumstances as their relationship with CHS, its officials, managers and Board of Directors, has been irrevocably damaged by their aforementioned actions;

Whether, assuming that Ms. Karchere and/or Ms. Lord were either supervisors or managerial employees, their actions in support of union organization efforts at CHS interfered with the free choice of employees eligible to vote in the election held on December 4, 2010, thus requiring that the results of that election be set aside, and a new election be conducted; and

Whether CHS violated Section 8(a)(1) of the NLRA by any of its statements or conduct during the union organizing campaign.

The ALJ ruled against CHS on virtually all of these issues, and CHS has filed multiple exceptions to the ALJ's ruling. As more fully argued below, CHS asserts that the evidence in these cases was sufficient to find that both Maureen Lord and Bridget Karchere were managerial employees, and that Ms. Lord was also a statutory supervisor. Therefore, CHS lawfully terminated their employment based on their actions in support of union organizing efforts, as neither was entitled to the protections of the NLRA.

Moreover, both Ms. Karchere and Ms. Lord made post-termination public statements demonstrating that they could not possibly be reinstated to their former, or any other positions, within CHS. Their statements were so extreme that it would not be reasonable to require the CHS officials, managers and supervisors they attacked to work with them. The ALJ, although reciting numerous case precedents, failed to address the specifics of this particular situation, especially considering the sensitive, high-level positions that Lord and Karchere held. The ALJ ignored or misconstrued evidence in the record, and did not give any weight to the obvious fact that the CHS officials, managers and supervisors the statements targeted could not possibly work with Ms. Karchere or Ms. Lord in anything approaching a normal workplace atmosphere.

Finally, CHS demonstrated that they both directly solicited support for unionization among CHS employees, and by their words and actions urged employees to execute a petition for unionization and vote in favor of union representation. In addition, their actions and statements implied a threat that CHS employees would be terminated by CHS management during the union organizing campaign, but that CHS employees could be "protected" if they followed Ms. Karchere and Ms. Lord's advice and/or example by signing the unionization petition and voting for union representation. Because of their status within CHS's organization as managerial and/or supervisory employees, their actions tainted the necessary laboratory conditions in which a National Labor Relations Board ("NLRB" or the "Board") election must be conducted, and therefore the results must be set aside and a new election directed.

#### II. Legal Basis for Determining Supervisory and Managerial Status

The question of the supervisory or managerial status of Ms. Lord and Ms. Karchere is central to most of the issues in this case. The legal standards for determining supervisory or managerial status are well-established. When applied to the facts in evidence they support the conclusion that Ms. Lord was a supervisor and also held a high level management position, and that Ms. Karchere was also a member of the CHS management team.

The starting point to analyze supervisory status is the list of 12 supervisory functions set out in 29 U.S.C. §152(11):

The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.

Pursuant to the Supreme Court's decision in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 167 LRRM 2164 (2001), these 12 supervisory functions are a starting point, and a three-part test must be met to establish actual statutory supervisor status: "Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer.'" Id. at 2168 (citation omitted). The burden of proof to establish supervisory status lies with the employer. Id. However, the employer's statutory burden in proving supervisor status is light because the tasks listed in the definition of supervisor are read in the disjunctive. NLRB v. Quinnipiac College, 256 F.3d 68, 167 LRRM 2487, 2491 (2d Cir. 2001), citing to Kentucky River, supra.

Thus, "An individual need possess only one of the enumerated indicia of authority in order to be a statutory supervisor," when such authority is exercised in the interest of the employer and requires the use of independent judgment. Sheraton Universal Hotel, 350 NLRB No. 84, 183 LRRM 1031, 1032 (NLRB 2007). Further, Section 2(11) "requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise." Id. at 1035 (emphasis added).

There are also so-called "secondary indicia" of supervisory status. Such secondary indicia, alone, are not dispositive of the issue of statutory supervisory status.

See, e.g. Training School at Vineland, 332 NLRB No. 152, 167 LRRM 1274, 1275

(NLRB 2000) (without evidence that managers possess any one of the indicia of statutory

authority, secondary indicia are not dispositive). However, such secondary indicia of supervisory status as attending "management meetings," receiving "management memos," and signing documentation "only given to members of management," can corroborate determination of statutory supervisor status that rests on one or more of the primary indicia. Sheraton Universal Hotel, Supra, 183 LLRM at 1035.

As to managerial status, "managerial employees are excluded from the protection of the NLRA by an exception established by the Board and approved by the Courts."

NLRB v. Meenan Oil Co., 139 F.3d 311, 157 LRRM 2641, 2646 (2d Cir. 1998). This was a well-established principle by the time of the Meenan Oil decision, as the U. S. Supreme Court had addressed this decades earlier. "The Wagner Act... did not expressly mention the term 'managerial employees.' After the Act's passage, however, the Board developed the concept of 'managerial employee' in a series of cases involving the appropriateness of bargaining units."

NLRB v. Bell Aerospace Co., 416 U.S. 267, 275, 85 LRRM 2945, 2948 (1974). The Court went on to conclude that "the Board's early decisions, the purpose and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals, all point unmistakably to the conclusion that 'managerial employees' are not covered by the Act." Id. at 289.

In Meenan Oil, relying upon the Bell Aerospace decision for the bedrock principle that "all managerial employees are excluded," the ultimate conclusion was that the employer failed to present sufficient evidence of the managerial status of the employee at issue there, who had allegedly solicited other employees' support for a union's petition. Meenan Oil, supra, 157 LRRM at 2647. However, Meenan Oil sets out the elements of managerial status in clear fashion:

Managerial employees are "those who formulate and effectuate management policies by expressing and making operative the decisions of their employer and who have discretion in the performance of their jobs independent of their employer's established policies." Id. at 2647, *citing* Bell Aerospace, *supra*.

The key inquiry is "whether employees were 'aligned with management.'" <u>Point Park Univ</u>. 457 F.3d 42, 180 LRRM 2072, 2075 (D.C. Cir. 2006) (citations omitted). The inquiry is fact intensive, and requires weighing "whether or not the persons at issue are involved in the formulation, determination and effectuation of management policies." <u>Id</u>. at 2076, (citations omitted).

Case law on the managerial exclusion is admittedly sparse. However, this is not because the principles are not firmly established or widely accepted. On the contrary, labor and management generally assume that people in positions of authority in the administrative ranks of an organization are excluded from collective bargaining, and would have no interest in it in any event.<sup>1</sup> Therefore, situations such as the one in this case, where managers are involved in union organizing, are few and far between.

#### III. Exceptions to ALJ's Findings and Conclusions

#1 The Respondent takes exception to the ALJ's conclusion that Maureen Lord was not a supervisor. (DALJ at p. 42, lines 34-36).

There was overwhelming evidence submitted at trial that showed Maureen Lord was a statutory supervisor. Arguably, the evidence divided into pre- and post-June 2009 categories. However, in both timeframes the evidence was plain that Ms. Lord possessed and exercised the type of authority necessary to establish primary indicia of her statutory supervisor status.<sup>2</sup> In addition, there was also evidence of secondary indicia of supervisory status that corroborated the primary indicia. It is telling that early in her testimony Ms. Lord referred to herself as holding the position of "Manager of Development and Technology." Transcript of ALJ hereinafter ("TR") at 117.

The Supreme Court underscored this thought decades ago. "Supervisors are management people... No one forced them to become supervisors. They abandoned the 'collective security' of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable than such 'security.'" Bell Aerospace, supra, 416 U.S. at 282, Fn. 11. Further, "[a]s Mr. Justice Douglas explained... the Wagner Act was designed to protect 'laborers' and 'workers,' not vice presidents and others clearly within the managerial hierarchy. Extension of the Act to cover true 'managerial employees' would indeed be revolutionary." Id.

Although Attorney Quigley did not agree, even the <u>Trial Judge</u> wondered whether, in light of Mr. Quigley's early questioning of Ms. Lord, and her responses, the General Counsel was simply conceding that Ms. Lord was in fact a statutory supervisor at least up to the summer of 2009. TR at 126.

Ms. Lord also conceded that she had responsibility for writing employee performance reviews for her subordinate employees, including Team Leader Jackie Czerwinski. This was solely her responsibility, something that remained consistent into June 2009 (TR at 241):

- Q. Did you ever write performance reviews for anyone?
- A. Yes, I did.
- Q. For whom?
- A. For Gay-Marie Kusznir and for Jackie Czerwinski. And then I consulted and collaborated with Jackie on the reviews for the customer service employees. TR at 125-126.

Although this did not continue for all her subordinates beyond approximately June of 2009, Ms. Lord's further testimony made it clear that her evaluation of CHS personnel did not cease at that time:

- Q. Did you stop doing that at some point?
- A. Yes, as of June 2009, I would have only been writing the review for Gay-Marie Kusznir.

Restated, Ms. Lord's supervision of Ms. Kusznir, which included evaluation of her performance, continued until Ms. Lord's termination. However, no review for Ms. Kusznir was done for year end 2009, because Ms. Lord was not there to do it. Since Ms. Lord was the only supervisor Ms. Kusznir had from the beginning of 2009 until mid-December of that year, it would have been difficult if not impossible to produce an evaluation of her in Ms. Lord's absence. TR at 271.

On a day to day basis, beyond her responsibility for the annual review, Ms. Lord had general oversight responsibility for Ms. Kusznir. TR at 275-276. This included timecard corrections, as shown in Respondent's Ex. 13. Ms. Lord also approved Ms. Kusznir's vacation requests, as demonstrated by Respondent's Ex. 14. In addition, Ms. Lord was responsible for correcting Ms. Kusznir if there were problems with her

performance of duties. For example, Respondent's Ex. 11(a) memorialized Ms. Lord's discussion with Ms. Kusznir about the importance of "proper form and attention to detail on donor acknowledgement letters."

While this was in 2008, Ms. Lord's testimony, as noted above, established that she retained ongoing responsibility for supervision of Ms. Kusznir right up to the day that Ms. Lord was terminated. It was not necessary for CHS to show at trial that Ms. Lord continued to issue memoranda like the one she issued to Ms. Kusznir in 2008, because it is not the exercise of supervisory authority that is required under the NLRA. The statute "requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise." Sheraton Universal Hotel, *supra*, 183 LRRM at 1035 (emphasis added). Ms. Lord had, by her own admission, ongoing authority "responsibly to direct" Ms. Kusznir, which is among the enumerated statutory supervisor factors, only one of which is necessary to establish supervisor status.

"An individual need possess only one of the enumerated indicia of authority in order to be a statutory supervisor," when such authority is exercised in the interest of the employer and requires the use of independent judgment. <u>Id</u>. at 1032. Given the importance to CHS of monetary donations, as testified to by several witnesses, Ms. Lord's correction of Ms. Kusznir's production of donor acknowledgement letters was indeed the direction of a subordinate employee, in the interest of the employer, and with independent judgment.

Beyond Ms. Kusznir, however, Ms. Lord also continued to direct the activities of several other employees. Specifically, Respondent's Ex. 21(b) shows Ms. Lord instructing subordinate employees in the PetPoint animal tracking system, as Mr. Gasecki testified. TR at 389. He stated: "All of the customer service people, every single one of them at the customer service desk, those six people would using it daily to record sales, to accept animals into the system, to adopt animals out of the system." Id. at 391. Further, if a staff member using the PetPoint system had a question, a problem,

any concern or input regarding that system, there was only one person they would take direction from: Maureen Lord. Id. at 392.

Ms. Lord's supervisory duties also included participation in the interview and hiring process at CHS. For example, she participated in management's consideration of Ms. Marissa Evans for the position of Certified Vet Tech in 2009. TR at 283, and Respondent's Ex. 16. Importantly, because of her certification, Ms. Evans presented CHS with a potential candidate for the role of District Manager. Ms. Marzano testified that ideally the District Manager at each CHS shelter should be a Certified Vet Tech, thus it was important that the hiring process for Ms. Evans include managers, like Maureen Lord. TR. at 284-285.

This too is evidence that Ms. Lord met the requirement that she possess at least one of the statutory primary indicia of supervisor status, as involvement in hiring is an express part of Section 2(11). Further, as previously noted, she need only possess authority in hiring, which was shown by her inclusion in the process for Ms. Evans and CHS's desire for her input and recommendations. That Ms. Evans was not ultimately hired, TR at 285, does not change the fact that Ms. Lord was in a position of managerial authority when the hiring process was underway.

Ms. Lord's participation in hiring decisions extended beyond the reorganization at CHS that occurred in June 2009. Ms. Lord was also involved in the process that resulted in CHS hiring Ms. Karyn Cordner late in 2009 to be its District Manager for the Newington facility. Although some of the testimony on this may have been unclear as to the exact date when Ms. Cordner was hired, a combination of Ms. Janice Marzano's testimony and the General Counsel's own exhibits help show that it had to be during the fall of 2009 that Ms. Lord participated in this hiring decision. Ms. Marzano testified:

- A. We hired a new District Manager in the first week of December of '09.
- Q. Is that Ms. Cordner?
- A. Right. (TR at 305).

The General Counsel then introduced GC Ex. 18, to demonstrate that Joanne Draper, who was Acting District Manager before Ms. Cordner was hired, issued discipline to employees previously supervised by Ms. Lord. The dates on these documents run from August through November of 2009. Thus, Ms. Draper was still serving as Acting District Manager into late fall of 2009, as Ms. Marzano testified, which corroborates Ms. Marzano's testimony as to when the hiring process for Ms. Cordner would have taken place.

Therefore, the evidence establishes that Ms. Lord was participating in hiring decisions shortly before she was terminated in December, 2009, which is a primary indicator of her supervisory status, and that she was a manager who was involved in the process of considering a candidate for the important role of District Manager. She even participated in the interview and hiring process for Mr. Gasecki when he was under consideration for the position of Chief Financial Officer. TR at 364. While this may not be directly germane to Ms. Lord's status as a supervisor of lower level employees, it does demonstrate the level of authority she possessed and the importance CHS placed on her opinion of candidates for hire, such as Angela Uttaro, whom Ms. Lord did in fact supervise for a period of time. TR at 283.

Ms. Lord was also a regular participant in CHS manager meetings, both the Monday Manager meetings and monthly meetings. TR at 286-287 and 288-289. This is a secondary indicia of supervisory status, as attending "management meetings," can corroborate a determination of statutory supervisor status that rests on one or more of the primary indicia. Sheraton Universal Hotel, supra, at 1035. As discussed later in this brief, these meetings were not just periodic updates where routine or mundane matters were addressed, but were a forum for strategic analysis where important policy issues were debated and resolved.

Ms. Lord also was treated differently than non-supervisory employees when it came to CHS's expectations under the "WAAG" program. WAAG (welcome, assess, advise and give thanks) is a "performance standard for all employees to be mindful of

being helpful to customers, clients and especially to each other." TR at 262. As seen in Respondent's Ex. 8(k), Ms. Lord signed off on "WAAG Guidelines for All Managers," in addition to the WAAG guidelines for all employees. Again this is a secondary indicia of supervisory status, as signing documentation "only given to members of management," also corroborates a determination of statutory supervisor status that rests on one or more of the primary indicia. Sheraton Universal Hotel, supra, 183 LRRM at 1035.

Similarly, Ms. Lord received internal CHS communications that were addressed to managers. For example, Ms. Lord was copied on virtually all of Bridget Karchere's emails rolling out and implementing the "Easy Labor Manager" ADP payroll software that Ms. Karchere had recommended to CHS management and which was adopted based on her recommendation. Respondent's Ex. 24. Receiving "management memos" is another type of secondary indicia of supervisory status. Sheraton Universal Hotel, supra, 183 LRRM at 1035.

Finally, regarding a small but telling secondary indicia of Ms. Lord's supervisory status, pertaining to her ongoing responsibility to supervise employee Gay-Marie Kusznir, there is Ms. Kusznir's own perspective on just who Maureen Lord was. Bearing in mind, as will be discussed later in this brief, that Ms. Kusznir attended the union organizational meetings that Ms. Lord attended, this is particularly important to the matters at issue in the instant cases. Simply put, in her own words, Ms. Kusznir's view of Ms. Lord was this, as part of a light-hearted but pointed email exchange: "But you are a boss." Respondent's Ex. 15.

The ALJ's conclusion that there was no evidence Maureen Lord made any recommendation concerning hiring decisions is contrary to the record, and Respondent takes exception to the ALJ's resulting failure to find Maureen Lord satisfied the statutory standard for supervisory status. (DALJ at p. 31, line 48 through p. 32 line 33, and DALJ p. 37, line 11, et seq.).

The ALJ incorrectly concluded that no longer supervising "customer service employees" also meant Ms. Lord lost all authority to recommend any hiring, and is

inconsistent with the ALJ's conclusion Ms. Lord still supervised the position held at the time by Administrative Assistant Ms. Gay Marie Kuznir. The ALJ's analysis of this issue is illogical. If Ms. Lord still supervised the position held by Ms. Kuznir, there is no basis on which to assume that such supervision involved *less* supervisory authority than Ms. Lord exercised when she was responsible for a greater number of employees. The number of employees supervised was apparently a factor in the ALJ's analysis, but there is no support for analyzing supervisory status in this fashion in the statutory language of 29 U.S.C. §§152(3) and (11).

Respondent also takes exception to the unwarranted conclusion that Respondent "apparently" conceded the irrelevancy of the "Uttaro hiring" as proof of Maureen Lord's supervisory status. DALJ at p. 37, lines 25-26. Her involvement in the hiring of Angela Uttaro is indicative of her high-level supervisory role in the Respondent's organization, notwithstanding the fact that shortly before her termination, supervisory responsibilities were redistributed so that Ms. Uttaro and certain others began reporting to a different supervisor. The reduction in Ms. Lord's supervisory duties to one employee, Gay Marie Kuznir, does not establish a loss of authority to hire or effectively recommend hire. There was ample evidence that Maureen Lord acted as a supervisor of multiple employees up to the middle of 2009. She directed the work of subordinates, evaluated their work, disciplined them, and was part of the hiring procedure. Respondent's acknowledgement of the reduction in the number of those she supervised to only one employee does not equate to any concession on the part of Respondent that her previous supervisory responsibilities with respect to other employees is irrelevant.

Additionally, the ALJ failed to find as a reasonable inference, based on Ms. Marzano's testimony that "feedback" was given to then CHS President Johnston regarding candidates for hire, that such feedback included input from Ms. Lord. DALJ at p. 37, lines 34-37, and p. 38, lines 9-10. Ms. Marzano's testimony was more than adequate to establish the process CHS used for assessing and hiring candidates for employment. Although more than willing to allocate adverse inferences against the Respondent on other matters, the ALJ failed to reach the reasonable inference in

Respondent's favor that Ms. Marzano's testimony was sufficient to demonstrate that feedback from the interviewers participating in the hiring process, Ms. Lord included, was provided to Mr. Johnston.

The ALJ failed to give appropriate weight to clear evidence that employee Gay Marie Kuznir considered Maureen Lord to be her supervisor. (DALJ at p. 32, lines 45-46).

Respondent incorporates by reference its argument above in support of the supervisory status of Maureen Lord. In light of the evidence demonstrating that Ms. Lord possessed primary indicia of supervisory status, such as her authority for hiring, disciplining and directing the work of her subordinates (including Ms. Kuznir), the further evidence of Ms. Kuznir's belief that Ms. Lord was in fact her supervisor warranted greater weight. Respondent's Ex. 15. To put it bluntly but simply, if Ms. Lord wasn't Ms. Kuznir's supervisor, then who was?

The fact that Mr. Johnston, then CHS President, was a decision-maker in hiring matters, is given too much weight by the ALJ, while testimony establishing Maureen Lord's authority to recommend hiring is given too little weight. (DALJ at p. 37, lines 38 - 39; p. 38, lines 35-39; and p. 39. lines 31-36).

The statute only requires only that the employee possess authority to exercise an enumerated supervisory function, not that the authority actually be exercised. Sheraton Universal Hotel, supra, 183 LRRM at 1035. Further, the statute contains no requirement that such authority be exercised independently. The evidence clearly demonstrated that Maureen Lord was part of Respondent's hiring process, and that she had meaningful input into hiring decisions. That Mr. Johnston played a role as well does not mean that Ms. Lord did not possess hiring authority sufficient to demonstrate her supervisory status.

The evidence established that Maureen Lord participated in the selection of a District Manager, but the ALJ failed to credit this evidence as supporting the existence of Ms. Lord's authority to recommend hiring decisions. The ALJ failed to credit this same evidence as demonstrating Ms. Lord's managerial status. (DALJ at p. 39, lines 4-50).

Respondent incorporates by reference its arguments above regarding Ms. Lord's supervisory authority and managerial status.

The ALJ improperly circumscribed the type of evidence necessary to demonstrate authority to discipline by (a) concluding that the failure to use the word "discipline" in a corrective memorandum from Ms. Lord to Ms. Kuznir demonstrates that Ms. Lord was not a statutory supervisor (DALJ at p. 40, lines 16 - 45), and (b) failing to find that Ms. Lord's demonstrated authority to discipline Customer Service employees also applied to her remaining subordinate, Gay Maria Kuznir, from June of 2009 until Ms. Lord's termination in December of 2009. (Id).

The term "discipline" is not limited to punishment. Any enlightened employer utilizes corrective counseling as the first step in the disciplinary process. A fair and objective reading of the memos in evidence in this case make it clear that Ms. Lord was exercising supervisory authority over her subordinates, by putting them on notice that their conduct or performance needed to improve. The ALJ, in this instance as in countless others, was applying a hyper technical reading of the statutory criteria in order to reach a result that assured Ms. Lord the protection of the Act.

The ALJ's use of the phrase "has not come close" in addressing Respondent's evidence of Ms. Lord's authority to discipline subordinates is inaccurate. DALJ at p. 40, line 52. Respondent submitted significant evidence of Ms. Lord's authority to discipline, which the ALJ failed to credit appropriately. It appears that the ALJ concluded that a lack of disciplinary action dated close in time to Ms. Lord's termination was proof she no longer possessed such authority. Yet, Respondent presented considerable evidence that Ms. Lord supervised Administrative Assistant Gay Marie Kuznir right up to the date of Ms. Lord's termination, for example the following:

- Q. And she was clearly under you for your entire time there?
- A. Not for the entire time. I believe she started processing donations and working with me in '05. TR. at 212, lines 13-16.

This testimony from Ms. Lord herself plainly implies that Ms. Kuznir was "under" Ms. Lord's supervision from 2005 to the end of Ms. Lord's employment, and

the testimony immediately following this exchange provided further evidence of Ms. Lord's supervisory authority over Ms. Kuznir. The mere fact that there was no evidence of disciplinary action in the time frame immediately preceding Ms. Lord's termination is not the same as proof that her authority to discipline no longer existed. Clearly, a competent subordinate employee might go for years without being disciplined by his or her supervisor, but this would not establish that, if an occasion warranting discipline arose, the employee's supervisor would lack authority to take disciplinary action. Again, if Ms. Lord wasn't Ms. Kuznir's supervisor, then who was?

#7 The ALJ incorrectly relies on the conclusion that employee performance reviews were not used by Respondent in calculating or deciding wage increases or future discipline as part of the analysis of Maureen Lord's supervisory status. (DALJ at p. 30, lines 19-48 through p. 31 line 46).

The ALJ ignores the demonstrated fact that Ms. Lord was responsible for the supervisory function of reviewing and evaluating the performance of the employees she supervised by adopting too narrow an interpretation of the performance review process. The test for supervisory status rests on whether or not the individual alleged to be a supervisor possesses at least one of the primary indicia of supervisory status. Evaluating an employee's performance and reporting on his/her strengths and areas for improvement constitutes "responsible direction" of that employee, regardless of whether or not it translates into compensation determinations.

The ALJ's suggestion that Respondent has "fallen considerably short" of successfully demonstrating Ms. Lord's supervisory authority (DALJ at p. 42, line 35) is inaccurate and contrary to the evidence.

Respondent incorporates by reference its arguments above regarding Ms. Lord's supervisory and managerial status. The ALJ's apparent finding that Ms. Lord was not Ms. Kuznir's supervisor effectively compels the conclusion that no one was supervising Ms. Kuznir except perhaps other than the then President of Respondent, Mr. Johnston, which is an illogical conclusion not supported by a shred of evidence. DALJ at pp. 41-42. There was ample evidence in this case, including evidence of Ms. Kuznir's own view of Ms. Lord as her "boss," to demonstrate Ms. Lord's supervisory status. Mr.

Johnston, as then President of CHS, was obviously the ultimate authority in regard to Respondent's entire staff, but Ms. Lord was Ms. Kuznir's direct, immediate supervisor.

- #9 The ALJ incorrectly concluded that Respondent failed to meet its burden of proof that (a) Maureen Lord and (b) Bridget Karchere were managerial employees. (DALJ at p. 43, lines 29-31).
- (a) Maureen Lord In addition to being a statutory supervisor, Ms. Lord was undoubtedly a manager as well, and the ALJ's conclusion to the contrary is incorrect. Although she began her employment with CHS as an Administrative Assistant to the President, she later became the CHS Manager of Development and Technology. TR at 117. "Manager" was not just her title; it was also clearly her status, as shown on the organizational chart in evidence as Respondent's Exhibit 34. In fact, Mr. Gasecki testified that "number four on the chart would have been Maureen Lord." TR at 365.<sup>3</sup>

Her own assessment of her position, and her managerial status, was amply demonstrated by Respondent's Ex. 7, Ms. Lord's LinkedIn resume and statement of relevant job experience. Originally created in 2006, Ms. Lord "updated it with pertinent dates" after her termination in December, 2009. TR at 195. The Trial Judge examined Ms. Lord quite closely on this, and her responses to his questions were revealing in light of the legal standard established by case precedents for managerial status: "whether or not the persons at issue are involved in the formulation, determination and effectuation of management policies." Point Park Univ., *supra*, 180 LRRM at 2076, (citations omitted).

For example, regarding Ms. Lord's statement in her resume (Respondent's Ex. 7), "Responsible for extensive growth of development strategies, most notably the implementation of on-line fundraising strategies, including developing and implementing social networking strategy," she had the following to say, specifically addressing CHS's decision to work with the on-line funding raising company Convio:

The ALJ apparently paid little attention to Respondent's Exhibit 34, presumably because he considered it self-serving. However, that ignores the uncontroverted testimony that the organizational chart was prepared long before Respondent had any hint of union activity. TR at 585.

- A. I was referring to my work with both online fundraising, which I was part of the team that implemented that at the Humane Society. It hadn't existed before....
- Q. Tell me about that. What exactly did you do and how did it get done?
- A. There was a team of us... we identified the company Convio as the company that, after I believe evaluating two or three different companies, the company that we liked the best to work with, to design our new website and the fundraising strategies.
- Q. And then this group made some sort of recommendation I assume to higher management?
- A. Yes, to management and to the board, you know, recommendation which was approved. TR at 221-223.

Clearly, Ms. Lord was part of an upper management team that spearheaded the work on moving CHS into serious on-line fundraising.

Ray Gasecki described this as a "combination of both" development and technology. TR at 381. Although Ms. Lord disingenuously testified at one point that "I didn't really think of myself as, you know, in management of the organization," TR at 144, it is undeniable that she was, and at the highest levels. In fact, she was so important to the Convio project that she initialed the contract with Convio before it was submitted to CHS's president for final execution. Respondent's Ex. 20(c). As Mr. Gasecki explained, the responsibility for contracts at CHS "first lies with the supervising manager," and in regard to Convio that was Maureen Lord, wearing her "technology" hat. TR at 384. Ms. Lord was not exaggerating when she stated on her LinkedIn resume that she was "Responsible for extensive growth of development strategies, most notably the implementation of on-line fundraising strategies...." Respondent's Ex. 7.

This was not an isolated event, as Ms. Lord had ongoing managerial responsibility for Convio and the success of the CHS website. She made this plain in her testimony:

- Q. Well, what role did you have in that?
- A. I would generally participate again along with the chief financial officer usually, evaluating suggestions from the company consultants as to what

- we could do as far as plans for sending out emails and designing our website in a certain way that would encourage more donations....
- Q. So you were the liaison between that company and --
- A. Yes, I was the liaison. And if they made suggestions that I was interested in, I would make a proposal to the CFO and then eventually to the president. TR at 224-225.

Note her perspective: "suggestions that <u>I was interested in....</u>" She acted as the filter. Ms. Lord was fully engaged in the formulation and implementation of management policy at the highest levels. Moreover, she applied her own independent judgment and discretion in her role as liaison to Convio, identifying the company's suggestions that she found interesting and then passing them along to other members of upper management. Mr. Gasecki confirmed this, pointing out that Ms. Lord, not only as liaison to Convio, but in her role as liaison to all of CHS's technology vendors, "acted really very independently." TR at 396. She did this right up until she was terminated. TR at 225.

In particular, when it came to Convio, this was an exercise of discretion and judgment that went straight to the core of CHS as a nonprofit, since on-line fundraising is a critical component of CHS's financing. But Ms. Lord did more than just handle Convio to raise funds for CHS as Manager of Development and Technology. As Mr. Gasecki testified, CHS also raises money through its Alpha Dog direct mail campaign. This campaign "generated approximately \$1,000,000 in revenue in 2009. Maybe slightly over that, 1.1 million." TR at 373.

Once again, "Maureen Lord managed the relationship between CHS and Alpha Dog," thus putting her at the heart of critical fund raising as a manager who "had full responsibility for the program." TR at 374. "She would develop a plan with - in concert with the vendor. She would oversee how well it was doing during the year, analyzing the vendor reports to see if we're getting the types of responses.... I think my first year there she presented the annual budget for Alpha Dog to the board for approval." Id.

A further example of Ms. Lord's critical importance to the management of CHS, and one that links her inextricably with the implementation of the organization's fundamental mission, was her involvement with PetPoint. As Ms. Janice Marzano detailed in her testimony, PetPoint is "shelter software." TR at 289. "It's kind of the heart and soul of an animal shelter because it tracks the animal from the time it comes in the door, with all the information that you would get from the previous owner or surrender... tracks the animal throughout the medical department... right on out through when the animal gets adopted... Very important." Id. Mr. Gasecki confirmed this, when he referred to PetPoint as "one of our core systems...." TR at 370.

Ms. Lord was the manager who brought PetPoint to CHS, but this was not the first time she shaped core CHS policy with technology to handle animal intake, processing and adoption. When asked by the Trial Judge for further examples of how she identified ways to improve CHS technology, she testified as follows:

- A. Such as I evaluated two different times when I worked there. We changed our database that we used for animal tracking because I was aware of a database that was superior to the one that we were using. So I, you know, evaluated the database and made the recommendation that I thought we should change.... That would go through the chain to Ray Gasecki and to the president.
- Q. And they approved that one?
- A. Yes.
- Q. There was more than one of those?
- A. Yes. There was one in 2006 and then we switched to a new database just in 2009.
- Q. And that was approved also?
- A. Yes.
- Q. Based on your recommendation?
- A. Yes.

Thus, in her own words, Ms. Lord once again underscored her importance to CHS's organization and the vital role she played in managing CHS operations. She instigated over several years many key changes in technology to maintain and improve CHS's

ability to fulfill its mission of accepting, caring for, and ultimately placing with new owners hundreds of animals. As she said, referring to her LinkedIn resume, she was not misrepresenting herself, and in fact, that resume was just a "brief summary of the type of duties that I was involved in. That's how I considered it." TR at 239.

The ALJ failed to give appropriate weight to significant evidence of Maureen Lord's managerial status in regard to major employer initiatives such as the Convio contract, Alpha Dog and Pet Point system, and as a result incorrectly concluded that Ms. Lord was not a managerial employee. DALJ at p. 33, line 1 through p. 35 line 37; p. 43 lines 29-31.

(b) <u>Bridget Karchere</u>. Bearing in mind that "Managerial employees are 'those who formulate and effectuate management policies," <u>Meenan Oil</u>, *supra*, the evidence clearly established that Bridget Karchere was a managerial employee at the time of her termination. While arguably when she was first hired this might not have been the case, in a relatively short time she took on increasing responsibility, and in 2009 was fully responsible for originating, recommending and implementing several important management initiatives. These included changes that modernized the CHS payroll process, and what was called in testimony the "aged cat" program. She was also given responsibility for preparing and presenting the 2011 budget for the Fox Memorial Clinic. Both of these policy initiatives continue today, and Mr. Gasecki eventually presented for approval the Fox budget she developed prior to her termination.

Although Ms. Karchere tried to downplay her role as a manager, and much attention was focused on her title by the General Counsel and the Charging Party, the credible evidence in this case proved she was a managerial employee. Her own testimony under direct examination revealed that CHS considered her a candidate for an important managerial role, as she was interviewed for possible hire by no less than the top executives of CHS: Richard Johnston, then President; Janice Marzano, assistant to the President and responsible for CHS's Human Resources function; Raymond Gasecki, incoming CFO; and Jeffrey Wands, outgoing CFO. TR at 23.

The General Counsel's own Exhibit 6, Ms. Karchere's performance evaluation, is also telling in this regard. Under *voir dire* Ms. Karchere acknowledged that this document was "as is" when she signed it. The Summary of Developmental Actions in this evaluation includes statements that discredit her testimony that her job duties were "not changing", such as the following:

During the coming year it is expected that Bridget will a) work towards achieving job knowledge and experience that positions her as a true second to the CFO and providing depth to the Finance Department; b) receive exposure to board meetings and eventually present Fox financial reports to the Board as more of her time becomes available; c) be responsible for the implementation of the planned eZLabor Manager function and provide training for managers regarding daily use... f) receive exposure to aspects of the month end closing procedures performed by the CFO, creating another area of backup for that resource....

GC Ex. 6.

Even Maureen Lord's testimony corroborated the points raised in this performance evaluation, as she was questioned about the eZLabor Manager system:

- A. I believe Bridget Karchere did the research and evaluated it, and actually she and I and Janice Marzano all met with the representative of the company. After speaking with him, I believe all three of us together approved of it, and Bridget probably wrote the memo to Ray Gasecki proposing that we use it.
- Q. And that recommendation was accepted?
- A. Yes. (TR at 244-245)

The Manager of Development and Technology, Maureen Lord, the person responsible for CHS Human Resources, Janice Marzano, and Ms. Karchere were the key personnel responsible for changing the way CHS handled the critical function of employee payroll processing. At the time this was actually presented to Mr. Gasecki, Ms. Karchere politely cross-copied Ms. Lord and Ms. Marzano on her memorandum, but was not shy in stating, "Because of the increase in accuracy and efficiency associated with these components I recommend the implementation of this conversion with our current ADP payroll system." Respondent's Ex. 23(b) (emphasis added).

Not "Maureen, Janice and I...," but Ms. Karchere alone made the recommendation for implementation of this change. And her recommendation was accepted, a recommendation that Ray Gasecki characterized as one that Ms. Karchere initiated. TR at 404-405. As Mr. Gasecki put it, this change was the "more modern way" to do payroll, moving from the old-fashioned, non-automated timecard system CHS had used until Ms. Karchere acted to effectuate and implement this significant policy change. Ms. Karchere was fully responsible for finding, contracting for, setting up and implementing the eZLabor Manager payroll system that brought CHS from a paper system into a modern, electronic payroll system. TR at 455. Like most managers in relatively small organizations, she may have had hands-on duties as well as higher level responsibilities, but she did not simply implement strategies developed by others; she was in fact the manager of the payroll function.

Consistent with that status, she was treated as a member of management from the outset of her employment, as exemplified by her inclusion in both Monday Manager meetings and CHS monthly business meetings. TR at 287-289. Ms. Marzano, CHS's executive assistant to the president and the individual in charge of human resources issues, always understood that Ms. Karchere was to be the next CFO. TR at 329. Consistent with this outlook, CHS introduced Ms. Karchere to the CHS community at large in a newsletter announcement, specifically noting that she would "serve as the primary backup to the Chief Financial Officer. Respondent's Ex. 17(c).

Even her initial employee orientation demonstrated her inclusion in CHS management. Respondent's Ex. 17 (b), Ms. Karchere's initial training and orientation schedule, reflects "someone coming on, on a high level... a more intense orientation... very carefully planned and scheduled." TR at 294. A clear example of just how important Ms. Karchere was, even as a brand new employee, is her introduction to the Board of Directors for CHS and the Board of Directors for the Fox Memorial Clinic, something that "[n]ot very many" new people would experience, something unusual. TR at 295. Even the General Counsel's Exhibit 19 shows how highly recommended Ms.

Karchere was by others she worked for, exactly the type of person CHS would want as part of its management team.

Further evidence of how CHS perceived Ms. Karchere as a key part of its management is found in Respondent's Ex. 34, the CHS organizational chart that was used by CHS's counsel and its president in resolving issues surrounding the composition of the bargaining unit. While it may not be determinative as to Ms. Karchere's actual functions, it does show what her role was understood to be at CHS by its other managers. It would certainly not make sense to show her on the organizational chart as one of the top half dozen or so managers if she was really just a payroll clerk.

Ms. Marzano, who was the manager for Human Resource functions, testified about the organizational chart, including the fact that she was the person who handwrote the various names on this document in association with the titles that are seen typed into various boxes, such "President" and "Chief Financial Officer." Id. "I was just identifying the staff names with the job titles" TR at 584. This was something she did at the request of then CHS president Richard Johnston in preparation for dealing with the question of bargaining unit composition. Mr. Johnston had remembered the chart, which had been prepared some time earlier by Ms. Marzano. TR at 585.

Mr. Gasecki had earlier testified that this chart displayed his own understanding of where in the organization Ms. Karchere was placed. TR at 365. As he explained, there was the president, the CFO, then Bridget Karchere. <u>Id</u>. He would later explain that "all the managers were essentially treated as equals." TR at 433-434. He also explained there was a distinction between the "operational" and the "financial" side of CHS, with Ms. Karchere being part of the financial side: "Bridget was part of finance. Finance did not have a span of control over operational activities." TR at 434.

22

This explains why it is not an indication of Ms. Karchere's status, or Ms. Lord's, that when inclement weather occurred it was the District Manager on the operational side who would decide whether or not to close the facility, and not someone on the financial side of the chart. TR at 436.

Of course, the General Counsel's case focused on attempting to downplay Ms. Karchere's role. For example, on direct examination the General Counsel elicited testimony that Ms. Karchere "sat in cubicles with the other finance department workers." TR at 21. But the CFO himself, Mr. Gasecki, also sat in that area for a time. In fact, he "sat at Bridget Karchere's desk and I worked there for the first month and a half." TR at 366-367. Where Ms. Karchere sat does not undermine the evidence of her involvement in managerial decision-making or her origination and implementation of significant policy initiatives.

Where she sat also did not influence CHS's utilization of Ms. Karchere in one of the most fundamental management tasks, setting a budget for the operation of the Fox Memorial Clinic. As previously noted, Ms. Karchere did not immediately work on such high level tasks. Rather, as Mr. Gasecki testified, "She started off initially just doing finance work...." TR at 401. But this lasted only a few months, and "as she progressed" CHS concluded that she was capable of fulfilling its expectations for her, that she would indeed be the primary backup to its CFO, which of course meant that she could and would perform the tasks that a CFO would perform.

Mr. Gasecki was very clear that "around mid-2009 we started thinking, you know, to develop her further we needed to give her even higher level responsibility."

Id. At that point Ms. Karchere was assigned the responsibility for the Fox budget for 2010. Despite the General Counsel and Charging Party's efforts to paint this project as some sort of "fill in the blanks" exercise, Mr. Gasecki was clear and credible in pointing out that even though he provided a template of his own past budget preparation for Ms. Karchere to follow, Ms. Karchere exercised independent judgment, determined budget variables on her own and bore responsibility for the project. TR at 447. In fact, the assistance that Mr. Gasecki provided to Ms. Karchere at the outset was no different than what any CFO would use if they were preparing a budget on their own, namely information from the prior budget year.

But CHS wanted the 2010 Fox budget to be Ms. Karchere's assignment, not Mr. Gasecki's, based on her successful first few months as she became integrated with the rest of the management team, and consistent with the long-range plan to groom her to be Mr. Gasecki's successor The evidence at trial amply demonstrated that, by mid-2009 and up to the time of her termination Ms. Karchere acted and was treated as a member of CHS management. Respondent's Ex. 22: "Richard [Johnston, CHS President] thought you should start attending Monday Managers meeting to further develop your knowledge of the organization." Respondent's Ex. 27(a), memorandum from Richard Johnston to Ray Gasecki and Bridget Karchere: "As we discussed at today's Monday morning meeting, I am requesting that Bridget Karchere become regularly involved in presenting the Financial Statements to the Fox Board of Directors meetings. I would like for you to plan on this to first occur at the Fox Memorial Clinic Board meeting on Wednesday, October 21, 2009." This in particular is evidence of CHS's long-term plan for Ms. Karchere's integration into upper level management, as originally envisioned.

Respondent's Ex. 27(a) through (c), all show that Ms. Karchere was responsible for the Fox 2010 budget, with Ray Gasecki supporting her. Mr. Gasecki's assistance does not dilute the responsibility Ms. Karchere held; CHS's management is a relatively small group, collegial and cooperative. Nothing less than teamwork among the managers would have been expected. But, in the final analysis, and following instructions from the President, Ms. Karchere held the lead role.

Mr. Gasecki's testimony was consistent in and of itself, and consistent with documentation such as Respondent's Ex. 27. The Charging Party's mock astonishment that the CFO would give Ms. Karchere such responsibility did not deter Mr. Gasecki from standing firm in his testimony. Ms. Karchere was free to consider how Mr. Gasecki did things from his template, "then make a decision as to whether she wanted to treat it the same way or if she wanted to treat it differently." TR at 448. Ms. Karchere would "talk to the manager" of Fox clinic about various budget items, "but then she would need to apply to each -- make -- use judgment and apply those to each category and determine what she thought was a reasonable cost estimate for the future...." Id.

Ms. Karchere made the budget assumptions and other determinations necessary to prepare the budget on her own. TR at 449. Each and every budget assumption was Ms. Karchere's work product, determined independently. TR at 450.

Naturally, Mr. Gasecki, working with Ms. Karchere as his management team member, provided her with his advice, TR at 453, but he never wavered in testifying that Ms. Karchere was responsible for and did in fact prepare the Fox 2010 budget. As Mr. Gasecki said, he "really had very little involvement." TR at 419. He did not interact with Joanne Freeman, Fox Clinic director; Ms. Karchere did. Yes, he had to "start her off in the process," TR at 420, he provided her with some templates, and he was there to answer her questions. However, once she had prepared the draft budget, including all the critical assumptions, Mr. Gasecki did not change any of it, and that budget was ultimately adopted by the Fox Board of Directors. <sup>5</sup> Id.

Another key project that Ms. Karchere developed and carried out involved a significant problem that CHS faced with its animal population, in particular cats that had been at CHS for a lengthy time. From the date she first began to work on this problem, through her analysis and recommendation, Bridget Karchere was unequivocally operating as a member of the management team, creating and implementing critical operating policy. While "aged cats" may not be a subject that occupies the time and attention of managers at the average Fortune 500 company, it is a very important issue at CHS.

As Ray Gasecki explained in detail, the length of time that an animal stays at CHS can become a problem. CHS does not euthanize animals for space. Therefore, long term animals "tie up our facility and reduce the number of animals that we could move through the facility." TR at 413. Although the origin of the program had its roots in managerial discussions of which Ms. Karchere was a part, it was primarily a result of Ms. Karchere's analysis and recommendation of discount adoption fees for "aged" cats that CHS implemented a policy that went directly to solving this significant problem.

<sup>&</sup>lt;sup>5</sup> The Fox budget was 20% of the total CHS budget, "a million dollars give or take." TR at 455.

Ms. Karchere actually changed management thinking about the problem. As Mr. Gasecki testified, she took CHS from thinking about the problem in one light, focused on unhelpful factors such as the color of the cat, or whether it was a "fat cat," to "more of a thought train that just centered on how long has the cat been in the system. We don't really need to know the reason why it's there so long. It's a cat we should offer an incentive on." TR at 414. Mr. Gasecki's testimony on this topic also underscores the fact the Monday Manager meetings consisted of more than routine discussions. Rather, they were brainstorming opportunities, at which all the members of the management team, such as Ms. Karchere, could "exchange ideas back and forth...." TR at 415.

In fact, regarding the aged cats problem, Mr. Gasecki had been thinking of a very different solution to the problem, but Ms. Karchere influenced and changed the CFO's thinking: "Bridget kind of convinced us that maybe it's not older cats, it's just a cat that's been in the system for awhile." <u>Id.</u> Ms. Karchere analyzed the problem and presented her conclusions and proposal for resolving the situation. Respondent's Ex. 26. Her analysis included a breakdown of potential revenue and cost savings, without losing sight of CHS's overall objective of placing animals with appropriate adopters. <u>Id.</u> In short, she was formulating and effectuating management policy. <u>Meenan Oil</u>, *supra*.

Ms. Karchere's management level contributions were not limited to budget issues or the management of CHS's animal population through the creation of a lower cost sales incentive. She also took part in the hiring process. Respondent's Ex. 28. In addition, she took the initiative for a study of CHS's employee-to-animal ratio over different time periods. TR at 423-424. As Mr. Gasecki noted, this was done on her own initiative, based on her concern about this topic, and Ms. Karchere made a point of raising it at loss control committee meetings. Id. at 424. In Mr. Gasecki's view, she was a member of management: "In our eyes, yes she was a manager. I'm aware of what her title was...I never thought it [job title] was an issue before." TR at 430.

Regarding Ms. Karchere's title of Finance Assistant, it is commonly understood in labor and employment law that job titles may not always be an accurate indicator of a

person's level of authority and/or responsibility. The General Counsel accepts this premise, but only when it is favorable to the position he is trying to establish. For example, Ms. Lord testified in straightforward fashion: "I was manager of development and technology." TR at 117. Yet the NLRB's case regarding Ms. Lord is built around attacking her status as a manager and/or supervisor, conveniently ignoring her title, while simultaneously making much of the lack of the word "manager" in Ms. Karchere's title. The Respondent asserts that the focus here should not be on titles, but on the testimony of credible witnesses like Mr. Gasecki.

The record contains no support for the ALJ's suggestion that the testimony of Respondent's witness, Raymond Gasecki, CFO, was "vague, conclusionary, [and] self-serving..." DALJ at p. 28, lines 4-5. The ALJ offers no basis whatsoever for this view, which is contrary to any reasonable characterization of Mr. Gasecki's thoughtful, measured and precise testimony. The ALJ's opinion is particularly unwarranted since the testimony of Bridget Karchere was at least as self-serving. Ms. Karchere's testimony was rife with self-serving statements, for example, her characterization without any evidentiary support that "the employees were treated cruelly and inhumanely." TR. p. 44, lines 11-12. Obviously, the testimony of almost any witness is tailored to serve the interests with which that witness is sympathetic. In that respect, the testimony of Mr. Gasecki was no different than the testimony of any other witnesses, including Ms. Lord and Ms. Karchere.

#10 The ALJ misconstrues the nature of the evidence of Ms. Lord's managerial employee status, and as a result misapplies precedent on this issue. (DALJ at p. 44, lines 45-48).

The ALJ inappropriately isolates Ms. Lord's "technical expertise with respect to computers," and concludes that her work did not carry out and effectuate the Respondent's business of "animal care," when in fact all of Ms. Lord's work, albeit with computers as her tool, was focused on maximizing Respondent's ability to care for animals by raising money for that purpose and providing the greatest possible tracking and oversight of each individual animal in Respondent's care. In many respects, without

Ms. Lord's work to effectuate the policies and goals of CHS, Respondent would not have been able to provide as much or as successful a level of animal care as it did. Respondent incorporates by reference its argument above in support of Ms. Lord's managerial employee status.

#11 The ALJ misconstrues the critical nature of Ms. Lord's work, and therefore misconstrues the authority she was vested with, when he attempts to downplay her "advertising" responsibility, and as a result her managerial role in fund raising work. (DALJ at p. 45, lines 19-30).

Respondent is a not-for-profit entity. Respondent is in the "business of animal care," which requires significant sums of money to keep it going. If Ms. Lord's efforts were unsuccessful, Respondent would not have been able to maintain its animal care operations. The critical importance of her work demonstrates Ms. Lord's managerial status without question. Respondent incorporates by reference its argument above in further support of Ms. Lord's managerial employee status.

Respondent excepts to the drawing of an adverse inference based on Respondent's "failure to call Freeman, an admitted supervisor." (DALJ at p. 28, lines 19-22).

Raymond Gasecki, CFO, was Bridget Karchere's supervisor, and did testify.

Ms. Freeman was not Ms. Karchere's supervisor; rather she was a member of the Respondent's management team along with Ms. Karchere, but with operational rather than administrative responsibilities. As such, she would not have knowledge of what Ms. Karchere did to prepare budget assumptions, as Mr. Gasecki would. Therefore, drawing an adverse inference based on a lack of testimony from an individual who would not have knowledge of relevant facts is not legally warranted.

#13 Because the ALJ incorrectly concluded that Maureen Lord was not a supervisor and that Maureen Lord and Bridget Karchere were not managerial employees, he incorrectly found that Respondent violated the Act by terminating their employment. (DALJ at p. 48, lines 22 and 23).

Pursuant to 29 U.S.C. §152(3), the term "'employee'... shall not include... any individual employed as a supervisor...." Further, "managerial employees are excluded from the protection of the NLRA by an exception established by the Board and approved by the Courts." NLRB v. Meenan Oil Co., 139 F.3d 311, 157 LRRM 2641, 2646 (2d Cir. 1998). Respondent incorporates by reference its argument above establishing that Ms. Lord was a supervisor and a manager and that Ms. Karchere was a manager, and as such are excluded from the protections of the NLRA.

#14 The ALJ incorrectly concluded that Maureen Lord and Bridget Karchere should be granted the remedy of reinstatement, based on his erroneous conclusions regarding their supervisory and/or managerial employee status. (DALJ at p. 55, line 49, through p. 56, lines 1 and 2).

Respondent incorporates by reference its argument above establishing that both Ms. Lord and Ms. Karchere should be denied reinstatement, based on their supervisory and/or managerial status, and resulting exclusion from the protection of the Act.

#15 The ALJ incorrectly concludes that Respondent failed to show that either Ms. Lord or Ms. Karchere engaged in "other conduct justifying Respondent's failure to reinstatement them." (DALJ at p. 57, lines 19 through 21)

The ALJ ignored Respondent's unrebutted evidence that showed both Ms. Lord and Ms. Karchere published ugly, insulting statements about the executive leadership and governance structure of CHS, the same management that they would be expected to work with, cooperatively and for common purpose, should they be reinstated. Their statements, as set out in Respondent's Ex. 1 through 5, and the statements of Ms. Lord's significant other, Mr. James Luberda, were plain evidence that not only can they not successfully be reintegrated into the CHS workplace, but that even if they were statutory employees and CHS had discharged them as a result of such statements, they would not have been entitled to the protection of the National Labor Relations Act.

It is well-established that there are circumstances in which an individual can lose the protections of the NLRA and be lawfully discharged from employment even where otherwise protected, concerted activity is occurring. The NLRB recently decided a case Constructors Co., 355 NLRB No. 150, 189 LRRM 1137, 1138 (NLRB 2010), the Board reviewed the "four factor test set forth in Atlantic Steel Co., 245 NLRB No. 107, 102 LRRM 1247 (1979) to determine whether employee misconduct that occurs during the course of otherwise protected activity is so opprobrious as to lose the protection of the Act." These four factors are (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and, (4) whether the outburst was provoked by the employer's unfair labor practice. Id. While the facts of the instant case are not typical of the fact patterns in which one would expect the Atlantic Steel factors to be applied, they provide a useful framework for addressing CHS's position that Ms. Lord and Ms. Karchere cannot possibly be reinstated successfully in light of the record evidence.

At least one Board decision is sufficiently similar to apply its rationale to the instant case. In <u>Trus Joist MacMillan</u>, 341 NLRB No. 45, 174 LRRM 1196, 1197 (NLRB 2004), the Board found that the employer did not violate the law when it discharged a pro-union employee based on his outrageous statements and actions, as the employee had "engaged in misconduct forfeiting the Act's protections." Although the Board had also found that the employee's actions had been in reaction to the employer's unfair labor practices — it had discharged or disciplined several pro-Union employees—the reaction of the employee in question was far too extreme. Unlike cases in which an employer's unlawful actions prompt an immediate reaction, which may be accepted as occurring "in the heat of the moment," in <u>Trus Joist</u> the employee did not react immediately. Rather, it was several days later that he launched "a planned, vituperative personal attack… against [a manager] in the presence of other supervisors… to undermine [his] managerial authority." <u>Id</u>. at 1199.

Based on this behavior, and applying the <u>Atlantic Steel</u> factors, the Board found that "it would be unreasonable to expect" various managers, and in particular the specific individual who was the target of the attack, "to work effectively" with the employee ever again. Id. The Board added that, despite agreeing with the judge below that the

employee's anger against the manager was the result of the unlawful termination of another employee, such agreement was "not the same as a finding that there were no limits to [the employee's] expression of his anger, particularly where, as here, it took place three days later." <u>Id</u>. The outburst and personal attack "was not a spontaneous or reflexive reaction to the news" of the termination. <u>Id</u>. Rather, only later, after time to reflect, time to plan, did the employee launch his personal attack. <u>Id</u>.

Similarly, Ms. Lord and Ms. Karchere, who were terminated in December of 2009, engaged in their attacks weeks and months later, not reflexively, or immediately following alleged unlawful actions by CHS. Further, they chose a forum that was public, journalist George Gombossy's website and blog, knowing full well that this would give them a large audience for their statements, far beyond the four walls of CHS. And those statements were indeed vituperative personal attacks, not worthy of protection under the Act. Accordingly, those statements cut off any remedy for either Ms. Lord or Ms. Karchere as of the date(s) of their publication, including any right of reinstatement.

#16 The ALJ incorrectly concluded that the Respondent failed to adduce evidence that Ms. Lord and Ms. Karchere would not be able to function as members of a team if reinstated. (DALJ at p. 55, lines 26-47).

Even if the statements of Ms. Lord and Ms. Karchere were protected under the Act, they are sufficiently extreme so as to destroy any prospect of a successful working relationship if reinstatement were to be ordered. Respondent submitted evidence of Ms. Lord's and Ms. Karchere's own words demonstrating their contempt and wholly negative attitude towards all members of Respondent's management team and the Chair of Respondent's Board of Directors. Both Ms. Lord and Ms. Karchere engaged in post-termination conduct that was so outrageous, so poisonous to their relationship with their employer and therefore to any possible restoration to employment at CHS, that neither one should be reinstated, as such a remedy would be wholly inappropriate<sup>6</sup>.

There was also evidence of pre-termination conduct that shows Ms. Karchere cannot be trusted. When given the opportunity to leave a meeting of managers Mr. Johnston convened to discuss the union election campaign, she simply sat in her chair, signaling her agreement that she belonged in the meeting as a CHS manager and was not uncomfortable with the topic at hand. Only at the hearing in this matter, a

Incredibly, the ALJ begins his analysis of Respondent's objection to the reinstatement of Ms. Lord and Ms. Karchere with the observation that Respondent offered no testimony from members of management at CHS that they would have any difficulty working with these two former team members. First, since he repeatedly characterizes the testimony of Respondent's witnesses as "self-serving" it is absurd to suggest that the ALJ would have accepted at face value any such evidence on this issue. Second, it goes without saying, and should not have to be proven, that an executive cannot be expected to work cooperatively with someone who has repeatedly and publicly called him or her a corrupt criminal who should be removed from the organization. Third, the fact that Respondent made this argument at the hearing, in its post-hearing brief, and in these exceptions should be sufficient evidence of the strong objectives of CHS leaders to the reinstatement of Ms. Lord and Ms. Karchere.

Following Ms. Lord's and Ms. Karchere's discharge, most of the key players in CHS management have remained in place. Although former President Richard Johnston is no longer with CHS, Ray Gasecki, CFO, Janice Marzano, executive assistant and the person then in charge of the Human Resources function, and Alicia Wright, manager of CHS's public relations, are all still employed and still play key roles in the organization. So too are a number of other supervisors who were employed at CHS when Ms. Lord and Ms Karchere were employed or have come on board since, but have likewise been attacked by them, such as Karyn Cordner, Newington District Manager at the time. To be reinstated, Ms. Lord and Ms. Karchere would have to work side by side with all of these managers. However, what Ms. Lord and Ms. Karchere have publicly written about these people has ruined any possibility that this could occur.

Both Ms. Karchere and Ms. Lord admitted that they made the statements contained in the aforementioned Respondent exhibits. Ms. Karchere testified "It looks like everything is what I said." TR at 97. Ms. Lord stated, "Yes, I made these

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full year after the fact, did she claim for the first time that she was afraid she would be fired if she left. TR at 80-81. She was free to leave, just as another person did, Lexi Poole. She was not fired for her personal choice that day, and continued to work at CHS thereafter. TR at 504-505.

comments." TR at 190. Without repeating in their entirety the statements contained in Respondent's exhibits, the following amply demonstrate why the nature, degree, and sheer volume of their comments makes reinstatement wholly inappropriate:

#### Ms. Karchere:

If I were lying I would be acting like CHS management and the [Board of Directors]. Misuse of funds, harassment of employees, and animal abuse and neglect; and they continue to operate in this fashion. Respondent's Ex. 4(a);

I can't wait to see what the public does to these criminal managers and corrupt [Board of Director] members. <u>Id</u>. 4(b);

Everything he [Chris White, Chair of the CHS Board of Directors] says and does gets exposed, as do all the lies and corruption that management is cooking up at CHS. <u>Id</u>. 4(c);

This goes to show you, the people running the shelters are the same people Richard put in place... the place is the same with or without Richard. We need to clear this management and [Board of Directors] out now and fast! Id. 4(e);

Those managers are heartless, crazy, selfish, and in denial... And one last retort I have for Karyn Cordner, from the CHS Board of Directors [and] now District Manager, who by the way does not have the experience to run any shelter let alone be an animal care worker.... The answer is your behavior staff are completely unqualified and so are you and your entire executive/management team. Id. 4(f); and

The current management and [Board of Directors] were appointed by Richard [Johnston] and continue to manage as though he is still there. The only way to repair the damage that's been done is to remove the obviously corrupt executives, managers, and Board members... And of course, promote the wonderful, dedicated, and knowledgeable staff who truly keep that place going. Not the Richard yes men who continue to make poor decisions and harass employees. <u>Id</u>. 4(i)

The foregoing amply demonstrates that it would be impossible to reintegrate Ms. Karchere into CHS. It is unreasonable to expect those executives and managers who continue to work at CHS, and who have been the victims of this barrage of abuse, to work with someone who repeatedly accuses them of lies, corruption, harassment and incompetence. Moreover, despite any contention by the Charging Party that these

statements were made to instigate or further an investigation into CHS by the Attorney General's office, these comments have no bearing on such an investigation. Calling CHS's executives, managers and Board members criminals, liars, corrupt, "yes men" and the like is simply a personal attack that adds no value to any investigation.

While Ms. Karchere's blog postings were clearly the most poisonous attacks in the torrent of abuse from union supporters, Ms. Lord's entries, and those of Mr. Luberda, her "significant other," were not far behind. Although the ALJ expressed his "serious doubts" about holding Ms. Lord responsible for Mr. Luberda's statements, DALJ p. 57, FN 29, given the facts of this case it is clear that CHS managers and Board members were aware that the two lived together, and that Mr. Luberda had no history of employment or other connection with the Respondent. Thus, it would be reasonable for them to infer that Mr. Luberda gained his twisted perspective on CHS and its leadership from Ms. Lord, and was likely speaking on her behalf.

Ms. Lord:

[Regarding a newly formed "euthanasia team"]: The token team members who have not sided with these managers (who happen to be their superiors) are most likely not respected by the managers and are probably fearful to fully stand by their opinions for fear of disciplinary action. This is the same way the organization has operated for years. Respondent's Ex. 5(b);

[People] do not believe that things are getting better. Also, new policies are only as good as the people implementing them;

If people have been proven to make bad decisions time and time again, no policy will turn them into effective leaders. Id. at 5(c); and

Anyone who knows the first thing about running a business knows that demonizing and harassing employees can only hurt business. I am not exaggerating when I say demonizing. The things that I have heard managers at all levels say about employees... Their behavior would be completely inappropriate even if the things they said were true, but it is even worse because they are absolutely untrue. It is absolutely essential for the entire management culture to change. Perhaps bringing in a competent new Executive Director... can change the practices of every one of these abusive managers and hold them accountable for their previous actions, other personnel changes may need to be made as well. Id. at 5(e)

The statements by Ms. Lord make clear that her opinion of the current management team will make re-integration into the upper levels of the organization impossible. The people she would be expected to work with or take direction from are the very ones she has called liars who should be replaced, and abusive, ineffective managers. Further, the statements of her significant other, Mr. Luberda, when read with her own, demonstrate they both think alike, and share a common and highly unflattering view of the CHS Board of Directors and CHS's managers.

#### Mr. Luberda:

[T]his is not simply a question of a couple of disgruntled employees. It's a testimony to a pattern of mismanagement, and, frankly, abuse, under Richard Johnston. Respondent's Ex. 6(a);

Based on my personal interaction with Chris White [Chair of the CHS Board], let alone the public evidence before us showing that, just like Richard Johnston, he has profited from CHS while enabling a toxic (literally) environment for staff and animals, I can assure you he is no better than Richard Johnston. I would strongly suggest boycotting his publications... until he steps down. Id. at 6(d); and

[Regarding Chris White] That, fundamentally, is the purpose of sharing this exchange on the heels of the sharing of Cathy's quite separate exchange with him - to give more public evidence of his character which, as even the title of this blog post suggests, is, to say the least, questionable. Id. at 6(f).

One can conclude from Mr. Luberda's and Ms. Lord's words that they share the same opinion of the Chair of the CHS Board of Directors. Yet, Ms. Lord would have to continue dealing with that Board (and the same Chair) in the future, if she were to be reinstated. This shows why reinstatement is inappropriate and demonstrates that the ALJ's conclusions in regard to the evidence are incorrect.

Further, in addition to the evidence showing that Ms. Lord and Ms. Karchere cannot reasonably be reintegrated into an organization whose managers, executives and directors they have viciously assailed, there was evidence that the level of trust necessary to reinstate them has been destroyed. There was clear evidence that these two former employees held positions with access to virtually any and all CHS information, including proprietary and highly confidential financial information. Mr. Gasecki testified that they

had totally destroyed any opportunity for trust going forward, that they were fired for disloyalty and because they had broken the trust CHS management placed in them.<sup>7</sup> TR at 456. The ALJ ignored this evidence.

It is unreasonable and unrealistic to expect that two such passionate and dedicated union organizers can return to work in their prior critical and sensitive roles and not take whatever advantage they can to use CHS information against it, to undermine those executives and managers they clearly revile, or otherwise to harm CHS. For all of these reasons, if the Trial Judge determines that either or both of them are entitled to any form of remedy, reinstatement to their former positions should not be included.

#17 The ALJ incorrectly asserts that the comments made by Maureen Lord and Bridget Karchere "were all made in the context of protesting" their allegedly unlawful terminations from employment. (DALJ at p. 57, lines 26-28).

The very language that Ms. Lord and Ms. Karchere used in their statements demonstrates that this assertion by the ALJ is completely inaccurate. Nowhere in their diatribes do they even mention their own dismissals. In fact, as seen from the exhibits quoted above, the context of the statements they made was not a protest of their terminations. Rather, their obvious intention was to eviscerate Respondent's entire administration from the Board of Directors down through Mr. Gasecki, Ms. Marzano, et al., wiping the slate clean so that managers and Directors in tune with their vision of animal shelter operations could be placed in charge.

#18 The ALJ failed, when addressing the issue of an order of reinstatement, to consider the magnitude of the statements made by Ms. Lord and Ms. Karchere in the context of returning them to work as part of Respondent's highest level of management, and the ALJ relied too heavily on cases involving reinstatement of lower level employees. (DALJ at p. 56, line 24 through p. 57 line 24).

It is undisputed that Ms. Lord and Ms. Karchere were not included in the stipulated group of eligible voters. However, if the union had petitioned for a wall-to-wall unit, and if it had been determined that neither of them were supervisors or managers, CHS would nevertheless have argued somehow that Ms. Lord, and especially Ms. Karchere, should be excluded from the voting unit based on their confidential roles. After all, access to all of CHS's financial and other confidential information would place her in an impossible position of conflict of interest if she were to return.

The evidence established without doubt, and the ALJ did not rule otherwise, that Mr. Gasecki, Ms. Marzano and others in Respondent's management were the target of extreme, personal attacks. It is absurd to conclude that Respondent's most highly placed managers, including Mr. Gasecki, who testified he had lost trust in Ms. Karchere, could be expected to resume any type of normal, effective working relationship with either Ms. Lord or Ms. Karchere. This is not a case where an employer is asked to reinstate one or two disgruntled, low-level workers. On the contrary, Ms. Lord and Ms. Karchere were key members of the management team, who if reinstated would be interacting on a daily basis with the same people they have publicly and repeatedly insulted and maligned.

#19 The ALJ has, in effect, required the Respondent to "prove a negative," by requiring evidence from the Respondent that Ms. Lord and Ms. Karchere did not subjectively believe their claims made in blog statements submitted in the record. (DALJ at p. 57, line 40 through p. 58 line 15).

By failing to require Ms. Lord and Ms. Karchere to adduce evidence supporting the truth or accuracy of their statements condemning CHS managers, the ALJ has allowed them to make false statements without consequences and burdened the Respondent with an unjustified reinstatement order.

#20 The ALJ mischaracterizes the Respondent's decision to expend its resources defending itself against a union organizing drive assisted by internal union "plants" by concluding that such action can constitute misuse of funds and corruption. (DALJ at p. 58, lines 35-40).

The ALJ asserted that the failure of the Respondent to disprove the venomous allegations made by Ms. Lord, Ms. Karchere and Mr. Laberda is part of his analysis in support of the order of reinstatement. In effect, the ALJ has required the Respondent to prove that its managers are *not*, e.g. "criminal," or "corrupt" or animal abusers. Adding insult to injury, he offers the outrageous suggestion that Respondent's decision to defend itself against the charges involved in this case, and to hire counsel for that purpose, "is misuse of funds and evidence of corruption."

#21 The ALJ incorrectly concluded that Maureen Lord's conduct did not coerce or interfere with employee free choice, (DALJ at p. 68, lines 39 through 44), that neither the conduct of Bridget Karchere nor the conduct of Maureen Lord was objectionable, (DALJ at p. 72, lines 23 and 24), and that the actions of Karchere and/or Lord were insufficient to warrant setting aside the election. (DALJ at p. 72, lines 28-30).

It is long-standing NLRB law that in order for a union organizing election to proceed properly it must take place in an atmosphere akin to that of a laboratory. When such conditions do not exist, whether because of the actions of employers, employees or union organizers, or even due to the actions of NLRB representatives themselves, a fair election cannot occur, and if an election has already taken place its results must be set aside and a new election held.

In election proceedings it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.

General Shoe Corp., 77 NLRB No. 18, 77 NLRB 124, 127 (1948).

The requirement of an untainted opportunity for freedom of expression by employees is so important that the NLRB has said that conduct that warrants overturning an election does not require any charge of unfair labor practices or proof of such unfair practices. <u>Id.</u> at 126. As stated in a later decision, "the test of conduct which may interfere with the 'laboratory conditions' for an election is <u>considerably more restrictive</u> than the test of conduct which amounts to interference, restraint or coercion" that violates the NLRA. <u>Dal-Tex Optical Co.</u>, 137 NLRB No. 189, 50 LRRM 1489, 1492 (1962) (emphasis added).

More recently, the NLRB has restated and reaffirmed "the Board's legal standard for determining when supervisory prounion activity is objectionable, warranting a new election." <u>Harborside Healthcare Inc.</u>, 343 NLRB No. 100, 176 LRRM 1113, 1115 (2004). This requires that the NLRB look to all the facts and circumstances to determine if the required laboratory conditions have been tainted. <u>General Shoe Corp.</u>, *supra*.

Ultimately, "the root question is whether the conduct had a reasonable tendency to interfere with employees' free choice to such an extent that it materially affected the results of the election." Madison Square Garden Ct. LLC, 350 NLRB No. 8, 182 LRRM 1073, 1076 (NLRB 2007). "When the conduct at issue is partisan supervisory activity during a union organizational effort, the root question remains the same." Id. The concern is that the "continuing relationship" between supervisors and employees creates the possibility that an employee will feel pressured into supporting the union "out of fear of retaliation by a union-oriented supervisor." Id., (citations omitted).

In <u>Madison Square Garden</u>, the Board took the opportunity to review its <u>Harborside</u> analysis. That analysis is a two-step inquiry that applies to cases involving objections to an election based upon prounion supervisory conduct, as follows:

- 1. Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election, including (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct and (b) an examination of the nature, extent, and context of the conduct in question.
- 2. Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

# 182 LRRM at 1076.

In addition, the Board has specified, in regard to supervisory solicitation of authorization cards, that "'absent mitigating circumstances,' such solicitations have 'an inherent tendency to interfere with the employee's freedom to choose to sign a card or not' and thus 'may be objectionable.'" Id.

Case law on union activity by managers, as opposed to supervisors, is almost non-existent, presumably because managers almost never support unionization, at least openly. However, a manager does not have to have direct and immediate supervisory

authority over an employee in order to have an undue influence upon him or her. That influence can be equally destructive of the required laboratory conditions regardless of whether it nudges an employee toward a "yes" or a "no" vote. Further, concerns about employer knowledge of who does or does not support the union are just as valid in the case of managers as they are in the case of supervisors, and perhaps more so.

Significantly, such situations can lead employees to believe that their employer, through the supervisor or manager involved, will know who supports the union "by the process of eliminating the nonsigners, who likely do not." <u>Id.</u> In addition, when the employer's supervisors or managers are involved in such circumstances an employee will reasonably be concerned that she or he must provide the "right" response, which will be viewed with favor, as opposed to the "wrong" response, which will not. <u>Id</u>.

Restated, when employees undertake union activities in the presence of their employer's supervisors or managers, such as signing union organizing petitions or authorization cards, the laboratory conditions that have been required for decades are destroyed. The employees must now fear that their actions in signing have shown their employer that they support the union. There is a strong likelihood that the employees actions have been driven by the presence of the supervisor or manager, and that the employee was trying provide that "right" answer and avoid the "wrong" one. An employee may even feel compelled to vote in favor of union representation, even though she or he might otherwise oppose it, simply in an effort to gain protection from a perceived potential for management retaliation.

Moreover, even if the improper activity occurs pre-petition, it can still be objectionable. In <u>Harborside</u> the Board addressed this point, noting that even if the improper actions at issue "occurred largely, if not wholly, prior to the filing of the petition, i.e., outside the critical period... this does not necessarily mean that the conduct is not cognizable as an objection because the impact... would ordinarily continue to be felt during the critical period." <u>Harborside</u>, 176 LRRM at 1120. <u>See also, Millard</u> Refrigerated Services Inc., 345 NLRB No. 95, 178 LRRM 1434, 1437 (NLRB 2005)

(consistent with long-standing exception to <u>Ideal Electric</u> rule<sup>8</sup>, effects of coercion by supervisory solicitations may continue to be felt during the critical period between petition and election even if the solicitations occurred prior to the filing of the petition).

In the instant case, this untenable and improper situation was magnified, as a well known supervisor and member of management for many years, Maureen Lord, observed employees signing petitions. So too did another known manager, Bridget Karchere, a person introduced to the CHS community as the "primary back-up to the Chief Financial Officer." Respondent's Ex. 17(c). In addition, both Ms. Lord and Ms. Karchere made significant efforts to draw in the employees from CHS's Waterford District facility. In their efforts to do so, they plainly stated that employees needed to sign the organizing petition to gain "protection." Thus, not only were the concerns expressed in Harborside in play because of their presence at union organizing meetings and their efforts to obtain petition signatures, their statements clearly promised that supporting the union would bear the benefit of the "protection" they spoke of.

Regarding the testimony of Ms. Lord and Ms. Karchere about their activities, while they clearly tried to downplay their involvement, when the facts they testified to are seen as a whole, it is apparent that they were deeply involved in the organizing campaign from beginning to end<sup>9</sup>. As a result, when the facts they testified to are combined with the testimony of Nancy Patterson, a complete picture emerges of two members of CHS management who were bound and determined to encourage unionization to the greatest extent possible, and who promised protection to those employees who would sign an organizing petition and assist their campaign.

For example, Ms. Karchere testified she first heard of union activity from Cathy DeMarco, a former CHS employee. TR at 43. Ms. DeMarco contacted Ms. Karchere and Ms. Karchere expressed interest because she was "curious." TR at 44. Why was

Ideal Electric, 134 NLRB No. 133, 49 LRRM 1316 (1961).

As noted above, the ALJ, while finding testimony from Respondent's witnesses to be "self-serving," failed to acknowledge the patently self-serving nature of Ms. Lord and Ms. Karchere's testimony.

she curious? In a telling moment Ms. Karchere admits that it was because she felt "the employees were treated cruelly and inhumanely." <u>Id</u>. This was just the first testimony she gave that showed the intense level of feeling she brought to her participation in the union organizing drive, and it shows why she is not believable when she says that she did not encourage other workers to go to union meetings or sign a petition. TR at 45. That disavowal is utterly inconsistent with her other testimony: "Well, everybody was talking about it. Well, all of us employees. We were all friends and we all kind of agreed that we should go to this meeting." TR at 44.

Ms. Karchere claims not to have spoken up at the union meeting. TR at 45. But it is simply not credible that she would speak with all her employee friends about the union, and that they would all agree to go, and yet at the actual meeting she would not voice her passionate belief that CHS was a cruel and inhumane place to work, and therefore its employees needed a union. It would be far more consistent with Ms. Karchere's overall testimony about her feelings about CHS and Richard Johnston, of whom she said she was afraid (TR at 57), to conclude that she openly expressed herself at the union meeting and made clear her views. She certainly was clear that she openly signed the union organizing petition, TR at 46, and that after she signed it, she passed it along to others so they too could sign it. TR at 70. Obviously, all the employees who were present could easily see that she signed.

Further, by the time of the second union meeting, which she also attended, Ms. Karchere made clear that "Everybody was talking about it." TR at 47. Is it simply not reasonable to believe that the person who felt CHS was so terrible, the person who so adamantly insisted at trial that she would not expose others who attended the meetings to possible action by CHS by revealing their identities, TR at 108, did not encourage people to attend and sign the petition.

The clearest proof that Ms. Karchere's initial testimony was disingenuous came when she admitted far more than merely being curious. She made her views on unionization known to those both "upstairs and downstairs." TR at 91. She made it

known "I was in the process of unionizing, that I signed the petition, yes." <u>Id</u>. She shared her view that CHS management treated employees cruelly and inhumanely. <u>Id</u>. She engaged with her coworkers at all levels and there were "[a] lot of things we griped about..." <u>Id</u>. She even said to employees that Richard Johnston "was a tyrant, and I talked about it because he was... Richard Johnston was a tyrant." TR at 91-92.

Any doubt about Ms. Karchere's tendency to speak her mind on such matters in no uncertain terms is quickly dispelled by a review of her blog comments. Respondent's Ex. 1 through 4. Taken together, the evidence shows that Ms. Karchere was actively involved early and deeply in union organizing. This "upstairs" employee did whatever she could draw in as many employees as possible, and get as many petition signatures as possible. She spread fear and unrest, and held the union out as the source of protection from a tyrannical management that she claimed in her own testimony would fire people if they knew who supported the union. "I know what they're going to do to these people. I know that they're protected by law, but that doesn't mean that they're not going to get harassed and tortured. That place is unbelievable...." TR at 108, (emphasis added).

Further, Ms. Lord had to be equally involved. She too learned of the union organizing activity from Cathy DeMarco. TR at 143. As with Ms. Karchere, it seems obvious that Ms. DeMarco reached out to Ms. Lord in order to draw in the highest level CHS employees that she felt she could trust to participate in the union campaign. The three of them, DeMarco, Karchere and Lord, all attended the union meetings and must have shared their thoughts and views with each other throughout this time, as Ms. DeMarco made clear to Ms. Lord early on that she had been speaking to employees and "they were concerned about their working conditions in the shelter...." TR at 144. Ms. Lord definitely was speaking with Ms. Karchere before the second union meeting. TR at 177, and they obviously plotted pro-union strategies together.

Perhaps, as she testified, Ms. Lord did not specifically encourage her subordinate, Gay-Marie Kusznir, to attend the union meetings. TR at 145. But she testified that Ms. Kusznir was present at both union meetings Ms. Lord attended, and she

was present when Ms. Lord quite openly signed the union organizing petition. TR at 219. Whether Ms. Lord signed first or last, before or after Ms. Kusznir, there should be no doubt that Ms. Kusznir, who knew perfectly well that Ms. Lord was her "boss," (Respondent's Ex. 15), had to understand that her supervisor, the person who conducted her performance reviews, gave her assignments, reviewed her work and adjusted her time records, was backing the union campaign. This is exactly the type of supervisory involvement that cannot stand under NLRB precedents such as <u>Harborside</u>, *supra*.

Moreover, beyond her attendance and actions at the two union meetings, if Ms. Lord was partnering with Ms. Karchere, she obviously participated in efforts to persuade employees to support unionization. There is certainly no doubt that she and Ms. Karchere reached out to CHS's Waterford facility. As Ms. Lord said, she called Nancy Patterson, District Manager, because she was "comfortable talking to her...." TR at 181. She also testified that she discussed this with Cathy DeMarco, demonstrating that she had become fully involved with the person who had initiated the entire union organizing campaign. Id. It is clear that Ms. Lord was, by that point, ready to do was ever was needed to obtain employee signatures on the organizing petition.

It's not surprising that Ms. Lord did not get into much detail about her telephone contact with Nancy Patterson, District Manager of CHS's Waterford facility. As Ms. Patterson testified, Ms. Lord was "quite upset" when she called Waterford, stating that things at the Newington facility were "really bad." TR at 468. This is in stark contrast to Ms. Lord's testimony in which she attempted to make her attendance at union meetings sound passive. Quite the opposite is likely true, extrapolating from Ms. Patterson's testimony, and taking into account the anger and emotion that her coorganizer Ms. Karchere brought to the campaign. Ms. Lord was likely an active participant in the type of discussions Ms. Karchere testified to when she admitted there were "[a] lot of things we griped about. TR at 91-92. Ms. Karchere admitted that she and other employees in attendance at union meetings "discussed things," and "we were all sharing stories about how we were mistreated." TR at 69. It is reasonable to

conclude that Ms. Lord was doing the exact same thing, and Ms. Patterson's description of what Ms. Lord had to say is completely consistent with this conclusion.

No doubt the Union will point out that some of the above conclusions about the role of Ms. Lord and Ms. Karchere in the union campaign are based on speculation rather than hard evidence. This is admittedly true, because employers are prohibited from gathering information about who said what at union meetings held during an organizing campaign. However, the Trial Judge is not constrained by the parameters of the testimony at the hearing. He can and should draw reasonable inferences from the testimony of the witnesses, and reach logical conclusions about the probable extent of active involvement by Ms. Lord and Ms. Karchere in the union's organizing effort.

Ms. Patterson was also very clear that Ms. Lord told her that she and others had been meeting with a union representative specifically "to get as many animal care staff to come sign a petition" as they could. TR at 470. Ms. Patterson also testified that Ms. Lord told her, and wanted her to share with the entire Waterford staff, that "[y]ou sign a petition and you're safe." Id. Ms. Lord expressly wanted Ms. Patterson to go to her staff and try to get them to meet with the union, and to tell them that such a meeting would be in "a safe place... sign a petition. They're [sic] jobs aren't going to be jeopardized." TR at 472. Ms. Patterson did as she was asked by her fellow manager and passed along to her subordinates what Ms. Lord had said to her.

Nancy Patterson, District Manager of CHS's Waterford facility, clearly knew Ms. Lord and Ms. Karchere to be managers. She would see them at monthly management meetings at the Newington facility, and she viewed them as managers based on her interaction with them. TR at 465-466. For example, she would go to Ms. Karchere for anything to do with payroll operations, and would turn to Ms. Lord for help with Shelter Buddy, and later Pet Point. Id. at 466. More importantly, as Ms. Patterson made clear, the Waterford *staff* would have "[a]bsolutely" known that Ms. Lord was a member of management. TR at 473.

Although Ms. Lord testified on direct examination that her attendance at union meetings was relatively low key, attending by herself, and not voicing any concerns of her own, Ms. Patterson's testimony revealed a different picture, one more consistent with Bridget Karchere's angry and emotional testimony. When Ms. Lord called Ms. Patterson a second time she was now "more agitated and scrambling." TR at 474. In addition, Ms. Patterson recalled that Ms. Lord was concerned with the petition and the necessary number of signatures she and her fellow organizers were trying to gather: "I think it was now definitely needed numbers and thought by pushing me or me pushing the staff the staff would come to one of these meetings or be influenced by what was going on." Id.

Simply put, Maureen Lord, CHS manager, was attempting to use Nancy Patterson, CHS District Manager, to solicit employee participation in union organizing. Specifically, Ms. Lord was using Ms. Patterson to get Waterford employees to attend a union meeting at which they would sign a petition in order to obtain "protection" from management, the same management that Ms. Karchere had undoubtedly been reviling in her discussions with workers at the meetings she attended.

Then Ms. Karchere reached out to Ms. Patterson as well, requesting that Ms. Patterson share Ms. Karchere's cell phone number with employees so they could call her about union organizing. TR at 475. There can be little doubt that Ms. Karchere, as passionate as she is about the union organizing and the need to bring down the management of CHS, would have taken the opportunity to speak with any CHS employee about her view on the "cruel and inhumane" treatment accorded workers, and their need to gain "protection" through signing a petition and obtaining union representation.

The outcome of the election was very close, as the ballot count was 18 in favor of the union, 15 against. Gen. Counsel Ex. 2. If only two employees had voted differently, the result would have been reversed. Under <u>Harborside</u>, this thin margin of union victory is very significant, as the improper behavior of managers Lord and Karchere, and their influence on the potential voters, very well could have swung the

tally in the union's favor. Therefore, in order to undo the damage to the required laboratory conditions that must exist during a union election, it is necessary to set aside this very close result and hold a new election, one that can proceed without the improper influence of CHS supervisory and managerial employees.

#22 The ALJ's Conclusions of Law numbered 3, 4 and 5 are based on his findings that Ms. Karchere and Ms. Lord were neither supervisors nor managers, and are therefore incorrect. (DALJ at p. 75, lines 21 through 45)

Respondent incorporates by reference its argument in support of its other Exceptions, specifically Exceptions 1 through 12.

#23 The ALJ's Conclusion of Law number 7 is based on his finding that the activities of Ms. Lord and Ms. Karchere disrupt the "laboratory conditions required for a free and fair election, and are therefore incorrect. (DALJ at p. 75, lines 44-45).

Respondent incorporates by reference its argument in support of its other Exceptions, specifically Exception 21.

### IV. Conclusion:

As noted in the introduction to these Exceptions, most of the key issues in this case turn on whether Ms. Lord and Ms. Karchere were supervisors or managers. Respondent is acutely aware of how difficult it is for anyone associated with an agency dedicated to protecting the rights of workers to form, join or assist unions to accept an outcome where an individual loses their job as a result of doing just that. However, the limits on the NLRB's jurisdiction where the individual in question is a supervisor or manager cannot be overlooked or dismissed. Nor can the ALJ ignore uncontroverted evidence, distort or misinterpret documents and testimony, or find every inference in favor of one party and against the other, in order to reach a desired result. In concluding that Ms. Lord and Ms. Karchere were neither supervisors nor mangers, the ALJ appears to have done just that.

Taking a step back and viewing the woods through the trees, these two individuals were clearly key players in the CHS organization. Nothing in the record contradicts Respondents' assertion that after the CEO and CFO, these two and only two or three others made up the management team on the administrative, as distinguished from operational or "animal care," side of the organization. They were central figures in key management roles. A reviewing court would look at the overall picture, and say these are not the type of rank and file employees the Act is intended to protect. They were treated as and acted as high level members of management, on whom CHS had a right to depend in formulating and implementing a plan to address the union organizing effort in 2009. The ALJ's conclusion that they were statutory employees flies in the face of the facts, the law, and common sense.

Any effort to reintegrate either Ms. Lord or Ms. Karchere into the ranks of upper management would be disastrous, especially if CHS is ultimately required to recognize and bargain with the union. Any reasonable decision-maker would recognize that two such vocal union supporters and management opponents could not possibly resume their former roles. A contrary conclusion would doom the parties to endless litigation.

Responded respectfully requests that the Board reconsider and reverse the ALJ's decision on the issues addressed herein.

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## **CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Exceptions to Decision of Administrative Law Judge and Brief in support thereof were electronically mailed or mailed via First Class Mail, postage prepaid, on August 5, 2011 to the following parties of record:

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